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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 481

LEO O. JOHNSON, DOING BUSINESS AS JOHNSON HAIR AND SCALP CLINIC, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 13) is reported at 266 F. 2d 560. The opinion and order of the Federal Trade Commission (R. 70–79) have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1959, following denial on July 21, 1959, of a petition for rehearing (Pet. 14–15). The petition for a writ of certiorari was filed on October 16, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Commission held that petitioner, by advertising his preparations for the prevention and cure of baldness in newspapers which are circulated in substantial numbers by the United States mail and in commerce by other means, caused the dissemination of false advertisements in violation of Section 12(a)(1) of the Federal Trade Commission Act. The questions presented are:

1. Whether Congress authorized the Federal Trade Commission to control the interstate advertising of a local business making no out-of-state sales, and had power to do so under the commierce clause of the Constitution.

2. Whether the placement of false advertisements in newspapers having a substantial out-of-state and mail circulation "cause[d]" the dissemination of such advertisements.

STATUTE INVOLVED

The applicable provisions of the Federal Trade Commission Act (38 Stat. 717, as amended, 52 Stat. 111, 15 U.S.C. 41) are as follows:

> SEC. 12. (a) It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mail, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, drugs, devices, or cosmetics; or
>
> (2) By any means, for the purpose of inducing, or which is likely to induce, directly

or indirectly, the purchase in commerce of food, drugs, devices, or cosmetics.

* * * * *

STATEMENT

The petitioner is engaged in the business of selling various cosmetics of his own preparation designed for external use in the prevention of baldness, the growing of hair, and the elimination of various scalp disorders. By extensive advertising in leading New Orleans newspapers, petitioner invites the public, including "[o]ut-of-town clients" (R. 19), to come to his clinic and either purchase a series of treatments or to purchase the preparations for home use. A substantial number of these newspapers are distributed through the United States mail and in interstate commerce by various means (R. 57, 74–75). There was no evidence, however, that petitioner ever sold any of his products to out-of-state clients or shipped his preparations across state lines.

The finding by the Hearing Examiner (R. 59–63), affirmed by the Commission (R. 75), that petitioner's advertisements were false and misleading in material respects is not contested. Petitioner is not an authority on the hair or scalp, and his preparations will have no beneficial effect in overcoming or preventing male-pattern baldness, which accounts for 95% or more of all cases of baldness.

The Commission concluded that petitioner's insertion of his false advertising in the New Orleans papers "cause[d]" the dissemination of such advertising "by United States mail, or in commerce" within the meaning of Section 12(a)(1) of the Act

(R. 76–79) and ordered petitioner to discontinue disseminating or causing to be disseminated by the United States mail or by any means in commerce these false and deceptive advertisements (R. 70–73). The court of appeals (Judge Cameron dissenting) affirmed *per curiam*, on the authority of its decision in *Mueller* v. *United States*, 262 F. 2d 443 (C.A. 5).

ARGUMENT

1. Petitioner urges that Congress, in adopting Section 12(a)(1) of the Federal Trade Commission Act in 1938, did not purport to cover false advertisements by a local "one-shop" business in local newspapers having an interstate circulation, and that if Congress so intended it was an unconstitutional exercise of the commerce power. It is clear, however, from the plain and unambiguous language of Section 12(a)(1) that Congress intended to forbid the use of the mails or other media of commerce for spreading false advertising regardless of whether the advertiser's business was itself in commerce (a matter covered by Section 12(a)(2)). *Shafe* v. *Federal Trade Commission*, 256 F. 2d 661 (C.A. 6); *Mueller* v. *United States*, *supra*. In adopting these provisions as part of the 1938 Wheeler-Lea amendments to the Act, 52 Stat. 114, Congress made clear that these "far reaching" provisions relating to false advertising were "entirely warranted, necessary for the effective control of illegitimate advertising" (H. Rep. 1613, 75th Cong., 1st Sess., p. 4). And the constitutional power of the Congress to reach such practices can no longer be disputed. See *United States* v. *Darby*, 312 U.S. 100;

Cloverleaf Co. v. *Patterson*, 315 U.S. 148; *Kirschbaum Co.* v. *Walling*, 316 U.S. 517; *Overnight Motor Co.* v. *Missel*, 316 U.S. 572; *Wickard* v. *Filburn*, 317 U.S. 111.

2. Petitioner also contends that the newspaper publishers, not the petitioner, "cause[d]" the dissemination of the false advertisements, within the meaning of Section 12(a)(1), by their independent selection of interstate means of circulation. It is immaterial, for purposes of this provision that petitioner did not directly disseminate the false advertising. Petitioner was undeniably responsible for the advertisements being placed in newspapers of general circulation. Thus, his voluntary action "caused, resulted in, the advertisements being disseminated * * *." *Mueller* v. *United States*, 262 F. 2d 443, 446 (C.A. 5). And see *Shafe* v. *Federal Trade Commission*, 256 F. 2d 661, 664 (C.A. 6).

Nor is the question whether the record here would provide sufficient proof of knowledge or intent to warrant criminal prosecution under Section 14(a) of the Act relevant to the determination whether petitioner's actions justified issuance of a prospective, remedial cease-and-desist order under Section 5. Such an order is but a "prophylactic" or "preventive measure taken in the interest of the general public." *Federal Trade Commission* v. *Gratz*, 253 U.S. 421, 432, 435 (dissenting opinion of Mr. Justice Brandeis).

CONCLUSION

The case presents no question warranting review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

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